

***LATE***

**HB 39**



# LATE

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TO THE SENATE COMMITTEE ON  
WAYS AND MEANS

TWENTY-FIFTH LEGISLATURE  
Regular Session of 2009

Monday, April 6, 2009  
9:30 a.m.

**TESTIMONY ON HOUSE BILL NO. 39, H.D. 2, PROPOSED S.D. 1  
RELATING TO STATE REVENUES.**

TO THE HONORABLE DONNA MERCADO KIM, CHAIR, SHAN S. TSUTSUI, VICE  
CHAIR, AND MEMBERS OF THE COMMITTEE:

My name is Lawrence Reifurth, Director of Commerce and Consumer Affairs  
("DCCA" or the "Department"). The Department has concerns about section 15 and  
part II of the proposed S.D. 1 of H.B. No. 39, H.D. 2.

Section 15 of the proposed S.D. 1 indicates that the Legislature determined that  
the Department's Compliance Resolution Fund (CRF) has at least \$3,300,000 in  
"excess" of the requirements of the fund. Section 15 would transfer \$3,300,000 out of  
the CRF on June 1, 2009 and deposit the moneys into the general fund for fiscal year  
2008-2009.

The proposed draft would also transfer interest earned from “short-term investments” from several special funds, including a few that are administered by the Department and its divisions.

**Transfer of “excess” funds.**

The Department understands and appreciates the economic and fiscal challenges with which the Administration and Legislature must contend. The Department also appreciates the need to find savings and other sources of revenues to help balance the general fund. However, the transfer contemplated in section 15 appears to again run afoul of the separation of power doctrine as decided by the Hawaii Supreme Court in *Hawaii Insurers Council v. Lingle*. In the *HIC* case, the Hawaii Supreme Court determined that the Legislature did not have the power to transfer \$3.5 million in regulatory fees from the CRF to the general fund. The Court found that by transferring those moneys, the Legislature treated those regulatory fees as general tax revenues and that the transfer of those moneys violated the separation of powers doctrine.

In section 15 of this proposal, the Legislature is contemplating the same kind of transfer that the Court has determined to be a violation of the separation of powers doctrine. As the CRF was the basis for the *HIC* case, we strongly urge the Committee to delete section 15 from the proposed draft to avoid a repeat of that case.

Alternatively, if the Committee is intent on transferring monies from special funds, I respectfully recommend that it consider the advice already given by the Attorney

General that the separation of powers problem might be avoided if the Legislature were to focus on money that flows from fees set by statute and not by rule.

The Committee appears to take the Attorney General's advice into account in addressing this issue. In the proposed S.D. 1, the Commission is proposing to transfer \$3.3 million from the CRF to the general fund. \$3.3 million is exactly the amount of money that the Department informed the Committee that could be transferred from programs funded by fees set by statute, and without reducing program cash reserves below the point where program operations would be put at risk.

**Transfer of interest earned on "short-term investments".**

Part II proposes to temporarily transfer into the general fund, the interest earned on "short-term investments" of several special funds, revolving funds, and special accounts, including the CRF, the Insurance Commissioner's Education and Training Fund, the Captive Insurance Administrative Fund, and the Loss Mitigation Grant Fund, over the period from July 1, 2009 to June 30, 2015.

As with the moneys derived from fees, the investment monies that the measure proposes to transfer from the CRF and the other funds administered by the Department and its divisions into the general fund arguably belong as much to our customers as the underlying funds which have been invested. As such, the proposed transfer could raise issues under the *HIC* case, and we urge you to consult with the Attorney General before proceeding with the proposal.

According to the Department of Budget and Finance, DCCA's investment pool interest income for the first seven months of FY09 is less than \$500,000 (presumably

due in large part to the poor performance of investments over this period). It may, therefore, be fair to assume that the value of the Department's FY09 investment income will be less than \$1 million.

As a result, the Department's concerns with regard to Part II are less focused on our practical ability to withstand the loss of the expected revenues (if these were the only monies to be transferred from the CRF over the same time period), as it is the principle that our customers' money should continue in the service of our customers, and the legal issues that have been raised by *HIC v. Lingle*.

Thank you for the opportunity to submit testimony.